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VIRGINIA LAW REGISTER.

EDITED BY GEORGE BRYAN

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We regret to learn of the threatened total blindness of Mr. Justice Brown of the United States Supreme Court. We learn that having lost the sight of one eye some time since, he has been advised that the loss of the other is now impending.

Mr. Justice Brown. Judge Brown is perhaps the most attentive listener to oral argument of all his brethren on the supreme bench. He is in his sixty-eighth year and cannot therefore retire from the bench on full salary for two years and it is understood that he will continue in service. He has the sympathy of the entire bar in his affliction, the culmination of which has been doubtless hastened by his habits of arduous labor.

An examination of the text of the Supply Lien Act of December 10, 1903, published elsewhere in this number, will disclose the fact that "travelling representatives" have been added to the enumerated employees of transportation, mining and manufacturing companies to whom is given, by the provisions of the act a lien for unpaid wages. This amendment was tacked on, while the measure was in committee, by a legislator who stated that he was a friend of the commercial traveller and saw no reason why he should not stand upon the same ground with his co-employees, the conductors, brakemen, firemen, clerks, mechanics, laborers, etc., who furnished services of no greater merit than do the modern knights of the road. All concur.

We submit the following case upon the statute of descents and shall be glad to receive brief answers from our readers to the question propounded. The case is not a moot one, but is now pending upon inquiry.

The Statute of Descents.

In 1830 Mrs. M., a widow, died seized of a tract of land in Virginia. She left two children, William and Rachel. William died

in 1834, leaving a widow and a daughter *en ventre sa mere*, born two months after his death and by name, Mary. In 1836, William's widow married S., and had by him in 1838 one child, George S. Mrs. S. died in 1869, her husband in 1884. Mary who was thus niece to Rachel and half-sister to George S. died unmarried and intestate in 1866. Rachel M. died in a year not definitely ascertained. Upon these facts, what is the title of George S. to the tract

(1) If Rachel died in 1885, i. e., after Mary's death.

(2) If she died in 1865, i. e., prior to Mary's death.

The fourth clause of section 2548 of the Code is as follows: "If there be no mother, nor brother, nor sister, *nor any descendant of either*, then one moiety" to the paternal, the other to the maternal kindred. Omit considerations of dower and adverse possession.

A practical question upon which opinion is said to differ in certain real estate circles is as to the obligation or duty of a trustee in a foreclosed deed of trust to examine the records, if a surplus remain, and pay it over in or hold it in trust for the satisfaction of subsequent liens. In other words.

Trust-Deeds. if, after the satisfaction of the debt secured by the deed to him, he pays the surplus to the grantor in pursuance of the terms of the deed, does he become personally liable to subsequent lienors, with notice of whose debts he is charged by their recordation? If no, a mortgagor could defeat entirely a second mortgagee of his remedy against the property by colluding with the trustee and obtaining from him the surplus. If yes, the law is much oftener honored hereabouts in the breach than in the observance, inasmuch as few trustees ever concern themselves as to liens other than their own or those ahead of them. Of course, no question can be made as to the property itself. The purchaser takes it with a good title, and the only point is as to the personal liability of the trustee. The authorities seem to agree that the question of the proper disposition of the surplus is a difficult one and must be decided by the party executing the power at his peril, though he may always refer its determination to a court of equity. In *Markey v. Langley*, 2 Otto, 142, it was held that a mortgagee in making a sale is a trustee for the benefit of all concerned and that liens upon the mortgaged property attach to the proceeds of

sale in the same manner, in the same order and with the same effect, as they bound the property before the sale.

In *Nelson v. Turner*, 97 Va. 54, it was held that a trustee in a foreclosed deed of trust who had faithfully executed the trust and disbursed the funds which came into his hands in the payment of the debt secured and expenses of sale, cannot be held responsible for the proceeds of such sale by a *prior* judgment creditor, whatever may be the latter's right as against the land itself. That right is of course a definite one, the purchaser taking the land *cum onere*.

There can be, in our judgment, only one safe course under the circumstances—the withholding by the trustee of the surplus purchase-money until he is satisfied, after proper examination, that there are no later liens upon the proceeds of sale in his hands.

The General Assembly in December passed an act, entitled “An Act to Provide for the Collection, Classification and Publication of the General Statutes of the Commonwealth.” The act recites that

**New Edition
of the Code.**

the many changes in the general statutes render it desirable that such publication should be made, and that the passage of many new laws made necessary by the new Constitution make it inexpedient to direct a general revision of the statutes until such laws have been tested by experience, and then authorizes John Garland Pollard, of the Richmond Bar, to publish the general statutes as they exist at the adjournment of the General Assembly to meet January, 1904, and provides that he shall arrange the statutes according to the plan followed in the Code of 1887, placing all the statutes of a general nature, which do not in terms amend the Code, under titles and chapters according to their subject matter, and that each statute shall be annotated with decisions of the Supreme Court of Appeals construing or affecting the same.